No. 19-1397

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

STEVES AND SONS, INC.,
Plaintiff-Appellee,

and

SAMUEL STEVES; EDWARD STEVES; JOHN G. PIERCE,
Counter Defendants-Appellees

v.

JELD-WEN, INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Virginia,
No. 16-cv-00545-REP

BRIEF FOR DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellant JELD-WEN, Inc. certifies that it is a wholly-owned subsidiary of JELD-WEN Holding, Inc., which is a publicly traded company. Onex Corporation, through its subsidiaries and affiliate entities, owns 10% or more of the stock of JELD-WEN Holding, Inc.

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INTRODUCTION

This appeal arises from an antitrust judgment that is unprecedented in the extreme. The district court entered the rarest of antitrust remedies—divestiture at the behest of a private party—in response to a complaint filed *four years* after the allegedly anticompetitive acquisition was consummated following review by the Department of Justice. Then in an unprecedented order in the alternative, the court awarded $139.4 million in "future lost profits" on the wildly speculative theory that a healthy and profitable company will suddenly go out of business overnight two years hence. The court did all this at the behest of a plaintiff that at most showed a breach of a contract and never demonstrated the essential elements of an *antitrust* claim—*i.e.*, impact and injury from reduced competition as compared to a but-for world without the acquisition. And in a final *piece de resistance*, the court entered judgment against JELD-WEN on claims it never brought and is actively litigating in another forum. None of these unprecedented rulings is compatible with established law or basic fairness. For a host of reasons, this unprecedented judgment cannot stand.

JURISDICTIONAL STATEMENT

The district court entered a final judgment on December 14, 2018. JELD-WEN filed timely post-trial motions. The court denied those motions and entered an amended final judgment on March 13, 2019. JELD-WEN filed its timely notice of appeal on April 12, 2019. The district court had jurisdiction over Steves' federal antitrust claim under 28 U.S.C. §§1331 and 1337, and over JELD-WEN's federal trade-secret counterclaims under 18 U.S.C. §1836(c) and 28 U.S.C. §1331. It had jurisdiction over the parties' state law claims under 28 U.S.C. §§1332(a) and 1367. JA195-96, 329. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the judgment for Steves on its antitrust claims must be reversed because Steves failed to prove antitrust impact or injury.

2. Whether the district court's extraordinary divestiture order must be reversed or vacated as barred by laches and/or traditional equitable principles.

3. Whether the court's alternative award of future lost profits must be reversed as unduly speculative and unsupported.

4. Whether the court's evidentiary errors require a new trial on Steves' claims.

5. Whether the court's instructional errors require a new trial on JELD-WEN's trade-secret counterclaims.

6. Whether the judgment for the individual intervenor-defendants must be vacated because JELD-WEN never brought any claims against them.

STATEMENT OF THE CASE

A. The Long-Term Supply Agreement

Most doors used in homes in the United States are "interior molded doors," which are made by sandwiching a wood frame and a solid or hollow core between two "doorskins" that make up the front and back of the finished door. JA197-98. The doorskin is made from a fibrous material such as wood chips or sawdust, which is combined with wax or resin and then molded by a metal die into paneled designs and textures. JA198. JELD-WEN is a doorskin manufacturer that produces several popular doorskins. JA550. JELD-WEN both uses its doorskins for its own interior molded doors, and sells its doorskins to other door manufacturers. *Id.* Steves, by contrast, does not make its own doorskins; it buys them from JELD-WEN and other doorskin manufacturers. *Id.* Steves is managed by two brothers, Sam and Edward Steves, who serve respectively as its president and CEO. JA1953.

To make interior molded doors, Steves must either buy shipments of doorskins on the "spot market," or negotiate a longer-term supply contract covering multiple shipments over multiple years. Steves prefers to buy doorskins under a long-term agreement, to ensure access to a reliable and consistent source. JA1980, 2113. JELD-WEN and Steves signed a long-term supply agreement in 2003, covering 90% of Steves' doorskin purchases. JA1974-75, 2107-08, 2110-11. That agreement governed the parties' relationship for the next seven years. In 2010, however, changes in California and federal law required JELD-WEN to develop a more costly line of doorskins. JA1976-78, 2109-10. When Steves insisted that those new doorskins were covered by the 2003 agreement, and refused to pay more to reflect their increased cost, JELD-WEN terminated the contract. JA1977-78, 2109-10. Steves then returned to buying doorskins on the spot market. JA1978-79, 2111-13.

After JELD-WEN terminated the agreement, Steves approached the other two American doorskin manufacturers doing business at the time, Masonite Corporation ("Masonite") and Craftmaster International ("CMI"), to explore a long-term supply agreement. JA1980-81, 2114. But Steves eventually decided to enter into a new long-term agreement with JELD-WEN, in part because the Steves brothers already knew and trusted JELD-WEN's then-president and CEO Philip Orsino. JA1984-85. Frustrated by that decision, Masonite stopped selling any doorskins to Steves, even cancelling existing orders. JA2174-75.

The long-term supply agreement that JELD-WEN and Steves signed in May 2012 (the "Supply Agreement") is the contract underlying this case. Steves committed to purchase at least 80% of its doorskins from JELD-WEN. JA1583-84. However, if Steves found another supplier that offered a price at least 3% below JELD-WEN's, and JELD-WEN refused to match, Steves could purchase any quantity of doorskins from that supplier. *Id.* The prices set varied annually, based on a formula that took into account changes in JELD-WEN's key input costs. JA552, 1584. The Agreement also provided quality assurances. JA1585.

The Supply Agreement expired by its terms on December 31, 2019, but would automatically renew for successive seven-year terms unless either party terminated it. JA1582-83. Steves could terminate for any reason upon two-year written notice, and JELD-WEN could terminate for any reason upon seven-year written notice. JA1583.

B. JELD-WEN's Acquisition of CMI

There have never been more than a handful of doorskin manufacturers in the United States. Before 2001, JELD-WEN and Masonite were the only two. JA3440. In 2001, as a condition of its merger with Premdor, Inc., Masonite spun off its doorskin manufacturing plant in Towanda, Pennsylvania, which became CMI, increasing that number to three. JA3441.

CMI initially showed strong financial performance, buoyed by the housing bubble that peaked in 2005. JA3442-43. Although CMI originally sold all of its doorskins to independent door manufacturers, it later followed JELD-WEN and Masonite by acquiring two door manufacturers and producing its own doors as well. JA3444. Once the housing bubble burst, however, CMI fell into financial difficulty. JA3446. By 2011, its owners were forced to invest their own funds to keep the struggling business afloat. *Id.* After exploring several options, they decided to sell the company. JA3446-47. After identifying and evaluating serious bids, CMI selected JELD-WEN and Masonite as the finalists—ensuring that no matter who won, the number of American doorskin manufacturers would fall back to two. JA3447.

CMI ultimately chose to sell to JELD-WEN, and the proposed transaction was announced in June 2012. JA553. That announcement came as no surprise to Steves. Steves knew that JELD-WEN planned to acquire CMI even before Steves signed the Supply Agreement, and understood that this meant that there would be only two domestic doorskin manufacturers (one of which had refused to sell to Steves). JA553, 1986, 2174-75.[1]

JELD-WEN voluntarily reported the deal to the Antitrust Division of the Department of Justice ("DOJ"), and on July 17, 2012, DOJ notified JELD-WEN that it had opened a preliminary investigation into the planned acquisition. JA380-81, 553. As part of that investigation, DOJ reached out to Steves, which responded that it did not oppose the acquisition. JA553. DOJ ended its investigation in September 2012 without taking any action, and the transaction closed in October 2012. *Id.*

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[1] Steves itself expressed interest in CMI, offering [redacted] for a minority ownership position. JA3447. CMI rejected that offer, and Steves did not pursue it further. *Id.*

JELD-WEN worked to ensure that the acquisition would produce its promised efficiencies by fully integrating CMI into its operations. It closed CMI's head office and two of its four door-manufacturing plants, and absorbed CMI's sales and administrative staff into JELD-WEN's organizational structure. JA553, 3451-52. JELD-WEN shuttered its doorskin plants in Dubuque, Iowa, and Marion, North Carolina, transferring their production to Towanda. JA3452-54. JELD-WEN consolidated the JELD-WEN and CMI doorskin designs into a single portfolio, retiring more than 100 dies and reducing the number of designs from 31 to 19—a process that cost some [redacted] and took a year to complete. JA553, 3458.

Because changing dies for different designs entails substantial downtime and lost capacity, JELD-WEN developed a "mix model" that allocated its doorskin manufacturing across its various facilities (including Towanda) to maximize production capacity and efficiency. JA3456-58, 3476. The mix model accounts for several variables, including the overall sales of specific designs both to independent door manufacturers and to JELD-WEN's own plants, the location of different doorskin dies, and freight costs associated with shipping doorskins to various buyers' locations. JA3457. As a result, Towanda achieved improved production volumes and cost efficiency that are dependent, to a significant degree, on its integration into JELD-WEN's network. JA3478. JELD-WEN also spent [redacted] on capital improvements at Towanda, including adding a new plant to produce the primer that

JELD-WEN uses to finish doorskins, installing a new hydraulic commander to enhance doorskin fiber quality, and upgrading the doorskin coating process and boiler operating system. JA554, 3455.

JELD-WEN also has devoted significant resources to developing two exterior trim and panel product lines called MiraTEC and Extira that JELD-WEN obtained as part of the acquisition (making JELD-WEN the only company to produce both trim and doorskin products). JA3443-44, 3459. MiraTEC and Extira are manufactured only at Towanda, and their manufacturing process is integrated with the doorskin-manufacturing process. JA3479 n.11. MiraTEC and Extira are lucrative "key anchor products" for JELD-WEN in the general building-products industry, and are central to its plans for expansion in that area. JA3459.

C. The Termination of the Supply Agreement

Beginning in June or July 2012—months before JELD-WEN's acquisition of CMI closed—Steves began noticing what it perceived as quality issues with JELD-WEN's doorskins. JA1997-2001, 2150. At the time, Steves did not consider those problems related to JELD-WEN's anticipated acquisition of CMI. JA3470. In late 2012, Steves received its first pricing notification under the Supply Agreement, which set doorskin prices for the following year. JA1988. Although Steves disagreed with JELD-WEN over those prices, Steves viewed that disagreement as purely contractual. JA1988, 3470, 3563.

From late 2012 to early 2013, JELD-WEN introduced two new doorskin designs called "Madison" and "Monroe." JA1989. When Steves tried to order those designs, JELD-WEN informed Steves that they were new products outside the Supply Agreement's pricing provisions. JA1989-93. JELD-WEN offered to sell them at a higher price. JA1991-97. Despite its "serious disagreement" with JELD-WEN's position, Steves accepted that offer. JA1992-97. Again, Steves viewed that dispute as purely contractual.

The JELD-WEN/Steves relationship took a sharp turn for the worse in early 2014, when Kirk Hachigian replaced Orsino as JELD-WEN's CEO. In April 2014, Hachigian informed Steves that he believed the Supply Agreement was unfair to JELD-WEN and should be renegotiated. JA2020-22, 2117-18, 2560-61. Hachigian informed Steves a month later that JELD-WEN might exercise its seven-year termination option of the Supply Agreement, which Hachigian saw as a way to bring the parties to the bargaining table. JA3564. In ensuing negotiations, Hachigian proposed that a new contract should include a "capital charge" to help offset JELD-WEN's considerable investments in capital improvements. JA2568-69, 3564. In response, Steves noted issues it wanted to renegotiate. JA2151-54, 2562-63, 2564-65. Negotiations soon stalled. JA2566-67.

In July 2014, Hachigian sent Steves an e-mail attaching an investor presentation by Masonite, and directing Steves to a slide describing the capital investments necessary to build and operate a doorskin plant. JA1665, 1680, 2023-2025, 2569-71. The presentation contained another slide—which Hachigian did *not* emphasize, or even mention—in which Masonite stated, as one bullet point out of nine, that it would no longer sell doorskins to other door manufacturers. JA1672, 2026-27, 2572; *cf.* JA3564-65 (suggesting Hachigian forwarded presentation as a "message" that Steves "had to deal with JELD-WEN because the only other supplier (Masonite) was not to be a future source of supply"). That decision by Masonite had no immediate effect on Steves, as Masonite had stopped selling to Steves (and even cancelled Steves' outstanding orders) when Steves signed the Supply Agreement with JELD-WEN in 2012. JA2174-75.

Meanwhile, Steves' unhappiness with JELD-WEN escalated. JA2121. According to Steves, there were ongoing problems with JELD-WEN's doorskins. JA2003-11. JELD-WEN also tightened its approach to reimbursements for defective doorskins, including those incorporated into finished doors. JA2138-39, 3463-64. In particular, JELD-WEN announced that it would reimburse only the cost of the defective doorskin, not the cost of an entire door. JA3464.

Hachigian met with Sam and Edward Steves in August 2014, and they discussed their various outstanding issues without reaching concrete resolution. JA2027-30, 2573-78. At that meeting, Hachigian again suggested that the most productive path forward would be for JELD-WEN to terminate the agreement, which would give the parties seven years to negotiate a new agreement. JA2155-56, 2577-78. According to Hachigian, Steves indicated no objection; instead, Edward Steves "suggested that he was fine with [JELD-WEN] going ahead and moving forward on the termination." JA2578; JA2157-59 ("not disput[ing]" that Edward Steves told Hachigian "[i]f you want to terminate, go ahead and terminate").

On September 10, 2014, JELD-WEN notified Steves that it was terminating the Supply Agreement. JA1788. As a result, the Supply Agreement will expire by its terms seven years from that date, on September 10, 2021. JA3462. In accordance with the sunset provision, JELD-WEN continued to supply Steves with doorskins under the agreement and continues to do so today. JA556.

Steves subsequently arranged meetings to evaluate whether it could obtain doorskins from Masonite. JA2132. Although Masonite was not willing to offer a long-term supply contract, it offered to sell Steves doorskins on the spot market. JA2132-35, 2175-77. Steves rejected that offer. JA2134-35, 2177. Steves further began exploring the possibility of purchasing doorskins from various foreign suppliers. *See, e.g.*, JA2062-64.

D. Steves' Trade-Secrets Theft

In December 2014, as contemplated by the Supply Agreement, JELD-WEN calculated changes in its key input costs and notified Steves that doorskin prices for the following year would increase by 1.26%. JA1789. JELD-WEN subsequently corrected that number twice in January 2015, to 1.71% and then 1.85%, revising the weight assigned to each input to reflect the integration of the Towanda plant and the shuttering of the Dubuque and Marion plants. JA1791-1801, 2122-27, 2131, 2524-31. Steves asked JELD-WEN to justify its calculations. JA2128-30. After further investigation, JELD-WEN concluded that the initial 1.26% calculation was more appropriate. JA2532-37.

JELD-WEN and Steves met in January 2015 to try to resolve their differences, but the meeting was a colossal failure. Edward Steves told Hachigian that Steves would make JELD-WEN's life "a living hell for the next seven years" until the Supply Agreement expired, and Hachigian responded that JELD-WEN would be "total pricks" unless Steves agreed to renegotiate. JA2579-80; *see* JA2031, 2120, 3568. After that, Hachigian refused to meet with Steves without lawyers present. JA2032-33, 2580-81.

Meanwhile, Steves began devoting substantial efforts to exploring the possibility of building its own doorskin-manufacturing plant. Not content to pursue that research itself, Steves hired former JELD-WEN employee John Pierce as a consultant in early 2015. Pierce had worked for JELD-WEN for more than 30 years, overseeing the design, construction, and configuration of three of JELD-WEN's doorskin-manufacturing facilities; when he retired, he was a senior vice president overseeing doorskin operations at several facilities. JA2922, 2924-26. Although

Pierce had signed non-disclosure agreements with JELD-WEN, JA2927-31, Steves paid Pierce thousands of dollars to break them. JA2932. To get Steves up-to-date information, Pierce contacted JELD-WEN employees and asked them detailed questions about JELD-WEN's manufacturing processes, and toured some of JELD-WEN's facilities—without ever revealing he was secretly working for Steves. JA2903-06, 2914-16, 3008-10.

Pierce realized that his work for Steves could give rise to a trade-secrets suit and shared his concerns with Steves. JA2956. He even suggested that he and Steves should consider deleting from their computers and e-mail servers all copies of every document they had exchanged and all of their meeting notes, and that he should rewrite his messages to Steves to suggest that all the information came just from his memory and experience. JA2957-58. Shortly thereafter, Steves asked Pierce to communicate with Steves only by telephone going forward. JA2959-60.

Pierce gave Steves a wide variety of confidential JELD-WEN information. His reports detailed the capacities and configurations of several of JELD-WEN's doorskin plants, as well as information about JELD-WEN's manufacturing inputs. JA2933-35, 2937-47. Pierce wrote Steves a memorandum on the potential benefits of partnering with an industry leader in medium-density fiberboard production to build a doorskin-manufacturing plant, including information about die changes, factory downtime, optimal inventory for a doorskin-manufacturing plant, and JELD-

WEN's suppliers. JA2948-55. Steves shared that information with two other consultants that Steves hired to help determine whether and how to build a doorskin-manufacturing plant. JA2999-3005. Both concluded that it was feasible for Steves to build a plant before the Supply Agreement would terminate. JA1442, 1458-1554.

E. The Dispute-Resolution Proceedings

In March 2015, Steves initiated formal dispute-resolution procedures under the Supply Agreement, asserting that JELD-WEN's policies regarding doorskin pricing, quality, and reimbursement breached the contract. JA1448-49. At the parties' second dispute-resolution conference, in May 2015—nearly three years after JELD-WEN announced its plans to acquire CMI—Steves suggested for the first time that their dispute might implicate antitrust concerns. JA2730, 2890-91, 3473. Steves repeated that suggestion at another mediation in September 2015, presenting JELD-WEN with a draft complaint that raised contract and antitrust claims. JA2732, 3473.

In December 2015, JELD-WEN again calculated its changes in key input costs to determine whether Steves' doorskin prices under the Supply Agreement for the next year should increase. JA2538-39. JELD-WEN determined that those costs had not increased—indeed, had actually decreased. JA2539. As JELD-WEN understood the Supply Agreement, that meant the prices Steves would owe for 2016 should remain the same, so JELD-WEN did not send Steves any increase notification. JA2539-40. The same thing happened the following year. *Id.*

Meanwhile, Steves asked DOJ to reexamine whether JELD-WEN's acquisition of CMI three years earlier had been anticompetitive. JA2850, 3474. Steves met with DOJ in December 2015 and produced documents the following month. JA3474. During those communications, Steves told DOJ that doorskin prices had not risen. JA202, 3129-66. In February 2016, DOJ informed JELD-WEN that it had opened an investigation into the consummated acquisition. JA3076-79. After meeting with JELD-WEN in April 2016, however, DOJ closed its investigation without taking any action. JA3474.

F. Steves' Novel Antitrust Lawsuit

At that point, Steves took matters into its own hands. In June 2016, Steves filed suit against JELD-WEN, alleging that JELD-WEN had breached the Supply Agreement by overcharging Steves for doorskins and reducing their quality. JA3014-60. But in addition to those breach-of-contract claims, Steves pursued a much more aggressive theory: It alleged that by acquiring CMI four years earlier (in a transaction Steves did not challenge at the time), JELD-WEN had obtained too much power in the doorskin market, and that this market power had emboldened JELD-WEN to breach the Supply Agreement. JA3020-21. As a result, Steves claimed that the alleged contractual breaches violated §7 of the Clayton Act, 15 U.S.C. §18, and that Steves could therefore seek not only the benefit of its contractual bargain with JELD-WEN, but also treble damages. In addition, Steves sought an unprecedented injunction to "restore competition to the doorskins and doors markets" by forcing JELD-WEN to unwind its four-year-old acquisition of CMI and divest the Towanda plant. JA3054; *see* 15 U.S.C. §§15(a), 26; JA559-60.

JELD-WEN moved to dismiss Steves' antitrust claims, explaining that Steves had not plausibly alleged that it suffered any *antitrust* injury from the acquisition, and that Steves' attempt to force JELD-WEN to unwind a four-year-old acquisition was barred by laches. Dkt.29. The district court denied the motion without argument in a cursory three-page order. JA255-57.

In discovery, JELD-WEN learned that Steves had stolen JELD-WEN's trade secrets to evaluate whether to build its own doorskin plant. JA261-62. In light of that startling development, the court granted JELD-WEN leave to assert trade-secrets and breach-of-contract counterclaims against Steves. JA283-84. Steves pursued multiple avenues to keep that evidence out of the trial of its own claims. It eventually convinced the court to dismiss JELD-WEN's breach-of-contract counterclaims altogether, to rule that JELD-WEN's trade-secrets counterclaims were irrelevant to Steves' claims, and to sever those counterclaims for a separate trial before a different jury. JA267-68, 270-78, 282-89.

After discovery closed, JELD-WEN sought summary judgment on Steves' antitrust claims, explaining again that Steves had no evidence of any antitrust injury and that its extraordinary request for divestiture was unwarranted. Dkt.379 at 11-

21, 27-35. In addition, JELD-WEN sought summary judgment on Steves' antitrust claims for future lost profits, explaining that these damages—which were based solely on the theory that Steves would go out of business in 2021 when the Supply Agreement ended—were wholly speculative and unripe. Dkt.379 at 21-27. The court denied that motion in the midst of trial. JA549-87. Although the court had announced after multiple rounds of briefing and argument that it believed JELD-WEN "ha[d] the better side of" the argument on Steves' future lost profits claim, JA1869, its mid-trial decision did an about-face, holding that the claim was ripe, but reserving judgment on whether those damages were speculative as a matter of law, JA549, 572-81.

G. The Breach-of-Contract and Antitrust Trial

At the trial on Steves' breach-of-contract and antitrust claims, the court made a series of evidentiary rulings that prevented JELD-WEN from mounting a meaningful defense. For example, on the eve of trial, the court excluded evidence that DOJ had twice investigated JELD-WEN's acquisition of CMI without taking any action. The court subsequently took that ruling a step further, refusing to allow JELD-WEN to present evidence of Steves' statements to DOJ during those investigations that contradicted the arguments it made to the jury. JA399-400. Also on the eve of trial, the court decided JELD-WEN could not introduce undisputed evidence that CMI was in severe financial distress at the time of acquisition, which would have undermined Steves' claim that the acquisition substantially lessened competition. JA540, 1872-73. Finally, the court prevented JELD-WEN from presenting evidence that Steves had stolen JELD-WEN's trade secrets to explore entering the doorskin market itself. JA401-03.

Deprived of that critical evidence, the jury held for Steves on both its breach-of-contract and antitrust claims. The jury found that JELD-WEN had breached the Supply Agreement by charging Steves prices beyond what the contract permitted (including by failing to decrease prices when input costs fell in 2016 and 2017), and awarded Steves about $8.6 million. JA605; JA2437-52, 2456-60. It found that the Madison and Monroe doorskins were covered by the agreement, and awarded Steves about $1.3 million. JA605; JA2459-60. And it found that JELD-WEN had breached the agreement by changing its reimbursement policies, awarding Steves approximately $2.2 million. JA605; JA1092-94, 1102-05. On that point, however, the court granted JELD-WEN judgment as a matter of law, finding Steves had not presented sufficient evidence that JELD-WEN had provided Steves any defective doorskins. JA1098-1102, 1105-19. The total award for Steves on its contract claims was thus roughly $9.9 million. JA1419.

The relief awarded on the antitrust claims, however, eclipsed that relief. Relying on Steves' theory that the 2012 CMI acquisition somehow caused JELD-WEN to breach the Supply Agreement years later, the jury found that the acquisition violated §7 of the Clayton Act. JA603. It then awarded Steves its claimed breach-of-contract damages a second time as antitrust damages. JA604; JA1376 n.9. That award included Steves' $2.2 million claim for the alleged quality defects, which the court inexplicably refused to exclude from the base antitrust award despite having ruled that Steves' evidence on that issue was insufficient. JA604, 1376 n.9.

The jury then awarded Steves more than *$46.4 million* in purported "future lost profits," based solely on the theory that Steves would be forced out of business the moment the Supply Agreement expires—in 2021—depriving Steves of *all* its projected future profits from that point forward. JA604, 1376-77. The court rejected JELD-WEN's argument that those damages were speculative and unsubstantiated in a cursory two-page order. JA666-67, 1376-77. After trebling, the court awarded Steves $36.4 million in past damages for the same injuries underlying its breach-of-contract claims, plus a whopping $139.4 million for lost future profits. JA1410, 1418.

H. The Remedies Hearing

Despite being awarded $139.4 million in damages for future lost profits, Steves asked the court for an extraordinary equitable remedy: an order compelling JELD-WEN to undo its by then six-years-old acquisition of CMI, break apart its fully integrated company, and divest the Towanda plant to an unspecified third-party buyer (with Steves itself as the only known potential bidder). JA3436-37, 3483. In addition, Steves asked the court to impose various "so-called 'behavioral' or 'conduct' remedies," JA3437, including ordering JELD-WEN to license all its intellectual property used in the Towanda plant to the divestiture buyer; limiting JELD-WEN's ability to purchase doorskins from the divested entity; giving other door manufacturers the option to terminate their supply agreements with JELD-WEN without penalty; and requiring the divested entity to offer Steves an eight-year supply agreement at prices significantly lower than any other purchaser was receiving. JA3437-38, 3547-49.

The court held a three-day evidentiary hearing and two-day argument on the issue of divestiture, during which Sam Steves testified almost exclusively about the importance of the Steves business to his family. Though Steves argued that divestiture would benefit the public interest, it did not present any evidence from any other door manufacturers or purchasers about whether they favored divestiture or believed it would improve competition. JELD-WEN forcefully opposed Steves' request, presenting witnesses who detailed the harm that JELD-WEN and its customers would suffer with the divestiture of Towanda, and arguing that Steves had not met its burden under the traditional equitable factors. JELD-WEN presented evidence of Steves' more than four-year unjustifiable delay, JA3199-3237, as well as evidence that Towanda would not be viable as an independent business if severed from the efficiencies inherent in JELD-WEN's integrated operations, *see, e.g.*, JA2767-68, 2771-75.

The United States filed a statement of interest urging the court to carefully consider certain factors and make sure it could "identify and vet a divestiture buyer likely to run [Towanda] independently as a vigorous competitor" before deciding to grant divestiture. JA964-65. The United States expressed considerable doubt that allowing *Steves* to acquire Towanda would improve competition, and explained why the conduct remedies Steves sought were more likely to impede competition than increase it. JA973-75.

The court nonetheless granted the request for divestiture—without heeding any of the United States' advice—becoming the first court in decades to order divestiture in an antitrust case brought by a private party. JA3433-3581. Despite recognizing (with considerable understatement) that divestiture is "stiff medicine," and that a narrower injunction "ordering JELD-WEN to supply Steves' [doorskin] requirements for a long term" would be enough to prevent Steves' supposed future injuries, the court declared divestiture warranted to "restore competition in the industry as a whole" by "plac[ing] three domestic doorskin suppliers in the doorskin market." JA3543-44.

The court did not decide to whom it would (or would not) divest the plant, or whether there was even anyone willing and able to run Towanda as a profitable doorskin supplier. Instead, relying on the fact that Towanda briefly earned a profit as an independent operation (during the pre-2005 housing bubble), the court predicted that additional potential buyers (beyond Steves itself) "can be expected to emerge again when the legal battles are ended." JA3484. On that optimistic basis, the court decided to order divestiture and appoint a special master to arrange the sale to an (unidentified) acquirer after any appeals concluded. JA1414, 3580-81.

The court granted most of the additional injunctive relief Steves requested, including ordering JELD-WEN to license its intellectual property to the divested entity, requiring the divested entity to satisfy the needs of third-party door manufacturers before selling JELD-WEN more than a set number of doorskins per year, and allowing third-party door manufacturers (none of whom had testified at trial or sought to intervene) to cancel their existing agreements with JELD-WEN. JA3547-49. The court also ordered the divested entity to negotiate an agreement to "assure Steves a supply of molded interior doorskins of the kind and in the volume reflected in the current Supply Agreement" for three years after that agreement expires. JA1415, 3547-49.

I. The Trade-Secrets Trial

Although JELD-WEN brought trade-secret counterclaims against Steves in this case, it was unable to sue Sam Steves, Edward Steves, and John Pierce in their individual capacities because the Virginia court lacked personal jurisdiction over them. Accordingly, JELD-WEN sued them in Texas state court, where they were all subject to personal jurisdiction. JA321-66. Shortly thereafter, all three moved to intervene as defendants in this action—even though JELD-WEN had not asserted any claims against them—in an apparent attempt to preclude the Texas suit. JA374-78. The district court granted that motion. JA417-42. However, JELD-WEN never asserted any claims against the intervenor-defendants in this litigation, seeking damages only from Steves. JA1131-33.

JELD-WEN's trade-secrets counterclaims were tried to a separate jury, which heard extensive evidence that Steves hired Pierce to steal JELD-WEN's trade secrets. *See supra* pp.12-14. In its jury instructions, however, the court skewed the jury's evaluation of that evidence by telling it that a trade secret (other than a combination trade secret) is unprotectable if *any part* of that secret is public knowledge, and that "malicious[]" misappropriation requires a specific "intent to cause injury or harm" rather than just recklessness or intentional theft. JA936, 946, 950, 2991-94. Based on those instructions, the jury concluded that only eight of the 67 trade secrets JELD-WEN asserted were protectable, and that JELD-WEN had not shown that the appropriation of any of them was willful and malicious. JA825-905. It awarded JELD-WEN a total of $1.2 million in damages against Steves (the only entity against which JELD-WEN asserted claims or sought damages). JA864, 904.

After denying JELD-WEN's post-trial motions, the court entered an amended final judgment that awarded Steves $36.4 million in treble past antitrust damages, based on the same overcharges and reimbursement issues underlying its breach-of-contract claims. Faced with the awkward reality that it had approved duplicative legal and equitable relief (a scenario generally prohibited by the need to show an inadequate remedy at law before obtaining an injunction) by endorsing both future lost profits damages and divestiture, the court entered an unprecedented order that granted Steves' preferred remedy of divestiture, but provided that if the divestiture were set aside on appeal, JELD-WEN should pay Steves $139.4 million in treble antitrust damages for future lost profits. JA1418. In the further alternative, the court ordered that if the antitrust award for future damages is set aside, JELD-WEN should pay Steves $9.9 million on its contract claims. JA1418-19.[2] The court ordered Steves to pay JELD-WEN $1.2 million on its trade-secret counterclaims—and entered judgment as a matter of law for Sam Steves, Edward Steves, and John Pierce on trade-secrets counterclaims that JELD-WEN never asserted against them. JA1419, 1421.[3]

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[2] The court presumably intended to award Steves breach-of-contract damages if the *past* antitrust damages were set aside. JA603-07. This Court should remand with instructions to correct that error if it becomes relevant.

[3] Those individuals have asked the district court to enjoin the Texas court from proceeding; that motion remains pending. Dkt.1890, 1892.

The court stayed its money judgment against JELD-WEN (upon bond) and ordered that JELD-WEN continue operating the Towanda plant under the supervision of a special master pending appeal. JA1416-17, 1439-40.

SUMMARY OF ARGUMENT

This never should have been an antitrust case. Steves suffered, at most, a breach of contract, not antitrust injury. Steves attempted to prove otherwise by claiming that JELD-WEN would not have breached the Supply Agreement had it not acquired CMI. But Steves cannot invoke the extraordinary remedies of the antitrust laws by pointing to the breach of a contract that protected it against any harms to competition that the acquisition might have produced.

Even assuming there were some theory by which Steves *could have* transmuted its contractual damages into antitrust injuries, Steves never even tried to make the necessary showing to establish antitrust impact and antitrust injury—namely, a showing that it was injured relative to a but-for world in which the acquisition did not occur (impact) and because of a reduction in market-wide competition (antitrust injury). Instead, the only measure of antitrust impact or injury that Steves ever offered was its claim that it paid JELD-WEN more than it should have *under the terms of the Supply Agreement*, in light of conditions prevailing *after* the acquisition. That will not do. The long-term supply agreement inked before the acquisition protected Steves from injury from the acquisition. Moreover, Steves could have suffered a contractual injury even if the acquisition was procompetitive and JELD-WEN breached by failing to pass along savings generated by its procompetitive efficiencies. In fact, that is precisely the theory on which Steves' damages model proceeded. By allowing Steves to bring an antitrust claim in the face of a pre-acquisition contract based only on a measure of contractual injuries, the district court permitted Steves to proceed without demonstrating the *sine qua non* of an antitrust action.

Having allowed an antitrust action to proceed without antitrust impact or injury, the court then went even further astray when it came to remedies. The unprecedented divestiture order Steves procured suffers multiple flaws. Most obviously, the fact that Steves did not seek that extraordinary remedy until *four years* after the acquisition should have made laches an insuperable obstacle to such extraordinary relief. Courts have invoked laches in cases where a private party waited until the day of consummation to challenge a proposed merger. Here, Steves waited more than four years, and expressly told DOJ that it did not object back before the massive costs associated with the acquisition and subsequent integration were incurred. Ordering divestiture at this late date should have been a non-starter. The order fares no better when evaluated under the traditional four-factor test for injunctions, as each of those factors weighs against this extraordinary remedy.

And the problems do not end there. The court ordered in the alternative that Steves could recover *$139.4 million* in "future lost profits" on the facially implausible theory that it will suddenly go out of business overnight as soon as its long-term contract with JELD-WEN expires. It committed egregious evidentiary and instructional errors that effectively precluded JELD-WEN from defending against Steves' antitrust claims and from proving its own trade-secrets counterclaims. And topping it all off, the court entered judgment for parties against whom JELD-WEN never even asserted any claims. Those radical and unprecedented results warrant reversal, or at a bare minimum remand for new trials. They also demonstrate that the proceedings below failed to deliver either the appearance or reality of basic fairness, such that if further proceedings are necessary, reassignment would be appropriate.

STANDARD OF REVIEW

This Court reviews questions of law de novo. *United States v. McNeal*, 818 F.3d 141, 148 (4th Cir. 2016). It reviews equitable relief and evidentiary rulings for abuse of discretion. *Id.*; *Solis v. Malkani*, 638 F.3d 269, 274 (4th Cir. 2011). A court "by definition abuses its discretion when it makes an error of law." *In re Grand Jury Subpoena*, 870 F.3d 312, 316 (4th Cir. 2017).

ARGUMENT

I. The District Court Erred By Allowing Steves To Transmute Its Breach-Of-Contract Claims Into Antitrust Claims.

"[S]ome antitrust cases are intrinsically hopeless because they merely dress up in antitrust garb what is, at best, a business tort or contract violation." *Procaps, S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1087 (11th Cir. 2016) (ellipsis omitted). This case is a prime example. At bottom, Steves claims that it was injured because JELD-WEN charged it more and gave it less than their Supply Agreement required. Steves is certainly free to sue for breach of contract under that theory. But Steves may not convert its run-of-the-mill breach-of-contract claims into extraordinary and expansive antitrust remedies—including tens of millions in treble damages, tens of millions more in future lost profits, and an unprecedented divestiture order—"for losses which are of no concern to the antitrust laws." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487 (1977).

A. A Breach of Contract Can Rarely, if Ever, Prove Antitrust Impact or Antitrust Injury.

A private plaintiff seeking to bring an antitrust claim must show not just injury flowing from the challenged practice, but also antitrust impact and antitrust injury. To demonstrate antitrust impact, a plaintiff must "construct a hypothetical market, a 'but-for' market, free of the restraints and conduct alleged to be anticompetitive," and demonstrate how the plaintiff is worse off because of that conduct. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000). For instance, if the plaintiff claims that the conduct enabled the defendant to charge it higher prices, it must show that it paid "a price higher than the competitive rate" in the but-for world. *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 422 (5th Cir. 2004); *see also, e.g.*, *Exhaust Unlimited, Inc. v. Cintas Corp.*, 223 F.R.D. 506, 513 (S.D. Ill. 2004) (plaintiff must prove that it "paid more than the price that would have existed 'but for' the alleged [violation]").

To demonstrate antitrust injury, a plaintiff must demonstrate an "'injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful.'" *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 311 (4th Cir. 2007) (quoting *Brunswick*, 429 U.S. at 489). In other words, the plaintiff must show not just that he suffered an injury caused by the challenged conduct, but that "his own injury coincides with the public detriment tending to result from the alleged violation." *Austin v. Blue Cross & Blue Shield of Ala.*, 903 F.2d 1385, 1389-90 (11th Cir. 1990); *accord, e.g.*, Areeda & Hovenkamp, *Antitrust Law* ¶337b (2018). Thus, a party injured by procompetitive aspects of the challenged conduct cannot bring an antitrust action.

The Supreme Court's seminal *Brunswick* decision is illustrative. There, three bowling centers claimed that a manufacturer of bowling equipment violated §7 of Clayton Act by buying and operating several defaulting bowling centers. 429 U.S. at 480-81. They alleged that the acquisitions adversely impacted them because they would have earned higher profits if those centers had gone out of business. *Id.* While the Court accepted the premises that the acquisitions were anticompetitive in some respects and caused the plaintiffs' lost profits, it nonetheless concluded that the plaintiffs could not sue because they had not suffered the kind of injury that the antitrust laws protect against. *Id.* at 488. As the Court explained, the damages the plaintiffs sought were "designed to provide them with the profits they would have realized had competition been *reduced*." *Id.* (emphasis added). "The antitrust laws, however, were enacted for 'the protection of *competition* not *competitors*,'" and so cannot be invoked by plaintiffs seeking damages for harms unrelated to harms to competition. *Id.* (emphases added).

Antitrust claims grounded in breach-of-contract allegations pose particular risks that the presence of breach-of-contract injury will obscure the absence of an antitrust impact and injury. After all, the fact that a plaintiff paid more than it should have *under a contract* does not necessarily show that it paid more than it would have paid but for an antitrust violation, or that its "injury coincides with the public detriment tending to result from the alleged violation." *Austin*, 903 F.2d at 1389-90. For one thing, a contract may entitle a party to fixed or reduced prices relative to a but-for world without a merger. If the plaintiffs are contractually entitled to pay the same or less than they would have paid absent the merger, then they cannot show antitrust impact. Moreover, a contract may entitle a party to reap the procompetitive benefits of a merger—for example, by entitling the party to any cost savings stemming from efficiencies produced by the merger. If, as here, the plaintiff alleges a contractual breach by failing to pass through such cost savings, it would suffer *contractual* injury that is manifestly not "'injury of the type the antitrust laws were intended to prevent.'" *Novell*, 505 F.3d at 311.

Precisely because pure contractual harms will rarely suffice to demonstrate antitrust impact and antitrust injury, courts have repeatedly rejected efforts to prove or measure injury in an antitrust case just by pointing to a breach of contract. *See, e.g.*, *Newman v. Universal Pictures*, 813 F.2d 1519 (9th Cir. 1987); *Orion Pictures Distrib. Corp. v. Syufy Enters.*, 829 F.2d 946, 948 (9th Cir. 1987); *Valley Prods. Co., v. Landmark, a Div. of Hosp. Franchise Sys., Inc.*, 128 F.3d 398, 403 (6th Cir. 1997); *2600 Woodley Rd. Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732, 738-39, 743 (3d Cir. 2004); 1 *Callman on Unfair Competition* §4:48 (4th ed. 2018).

The Ninth Circuit's *Orion* decision exemplifies the point. There, the plaintiff Orion (a movie distributor) signed a contract with the defendant Syufy (a theater owner) under which Syufy licensed the right to display a movie at its Las Vegas theaters in exchange for a guaranteed payment to Orion of at least $152,000. 829 F.2d at 947-48. After signing the contract, Syufy bought out the other theaters in Las Vegas, and repudiated its guarantee to Orion. Orion sued Syufy for breach of contract and under §2 of the Sherman Act, alleging that Syufy's monopolization of the Las Vegas theaters market enabled its later breach of contract. *Id.* at 949. The Ninth Circuit rejected that claim, explaining that Orion's contractual losses "do not constitute antitrust injury." *Id.* The parties signed their contract before the allegedly anticompetitive conduct even occurred, and the contract itself protected Orion from Syufy's enhanced market power. *Id.* Once the contract was signed, Syufy's duties "were fixed by its contractual commitment," not by competition. *Id.* Accordingly, even if the later monopolization enabled Syufy to breach the contract, Orion suffered only "a breach of contract, not an antitrust injury." *Id.*

As *Orion* and other cases reflect, courts must be exceedingly cautious when confronted with antitrust claims based on an alleged breach of contract. Proof of a contractual breach does little to advance the ball. The plaintiff must demonstrate not only that its injury "occurred 'by reason of' the unlawful acquisition[]," *Brunswick*, 429 U.S. at 488, but that its injury "coincides with the public detriment tending to result from the alleged violation." *Austin*, 903 F.2d at 1389-90. Merely showing that the plaintiff is worse off because of the breach of contract does not even show the former, let alone the latter.

B. Steves Failed To Identify Any Antitrust Impact or Antitrust Injury It Could Have Suffered.

Those principles doom Steves' antitrust claims. Steves based both its antitrust impact and antitrust injury on its theory that the CMI acquisition emboldened JELD-WEN to breach the Supply Agreement. But some of the alleged breaches involved the failure to pass through cost savings from the acquisition, and Steves never demonstrated how the alleged contractual breaches made it worse off relative to a but-for world without the acquisition, let alone caused Steves "'injury of the type the antitrust laws were intended to prevent.'" *Novell*, 505 F.3d at 311. Instead, Steves proceeded on the assumption that so long as it could link the purported breach of contract to the acquisition, it would show both antitrust impact and injury. Not so.

At the outset, the fact that Steves was fully protected by a contract that pre-dated the acquisition itself precludes a showing that Steves suffered antitrust impact or injury. Whatever Steves may have been entitled to under the Supply Agreement, the Supply Agreement itself protected Steves against any anticompetitive aspects of the acquisition or the loss of any contractual entitlements—as evidenced by the fact that the jury fully remedied Steves' breach-of-contract claims by awarding Steves nearly $10 million in contract damages. JA1419. Just as in *Orion*, JELD-WEN's duties toward Steves "were fixed by its contractual commitment," which pre-dated the challenged conduct, and contractually recoverable losses that Steves suffered on account of a failure to abide by those duties "do not constitute antitrust injury." 829 F.2d at 959. Steves cannot convert its contractual damages into treble antitrust damages by "merely dress[ing] up in antitrust garb what is, at best, a … contract violation." *Procaps*, 845 F.3d at 1087.

But even assuming there were some way to show that, despite Steves' contractual protections, the CMI acquisition made Steves worse off relative to a but-for world in a way that corresponds to antitrust injury, Steves never even tried to make that showing. In fact, Steves conducted no but-for analysis at all. Instead, Steves sought as its sole measure of past damages the difference between what it actually paid JELD-WEN post-acquisition and the lower amount it believes it owed JELD-WEN under the terms of the Supply Agreement post-acquisition. In other words, Steves' antitrust claims were avowedly based on a comparison to a but-for world in which JELD-WEN *never breached the Supply Agreement*, not a but-for world in which JELD-WEN never acquired CMI. Having refused to "construct a hypothetical market, a 'but-for' market, free of the restraints and conduct alleged to be anticompetitive," *Concord Boat*, 207 F.3d at 1056, Steves was left with no way to even begin to prove that it paid "a price higher than the competitive rate" in that but-for world. *Robinson*, 387 F.3d at 422. In other words, it was left with no way to even try to prove antitrust impact.

Making matters worse, Steves' theory avowedly left it claiming injuries that are manifestly not "'of the type the antitrust laws were intended to prevent.'" *Novell*, 505 F.3d at 311. For Steves to show that any injury *Steves* suffered "as an individual competitor" coincides with the injury to "competition as a whole," *Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991), it must show that it is worse off in a way that coincides with reduced competition or some other anti-competitive aspect of the acquisition. After all, if Steves is worse off only because it did not get the full benefit of a contract that entitled it to share in the efficiency gains of the acquisition, then Steves has not suffered "'injury of the type the antitrust laws were intended to prevent.'" *Novell*, 505 F.3d at 311.

Yet that is precisely what Steves claimed. Not only did Steves' expert readily concede that he did not even *try* to calculate the market price for doorskins absent the acquisition—let alone show that it was lower than what Steves actually paid (or what Steves thinks it should have paid under the Supply Agreement). JA2380. Steves' damages model also admittedly baked in a claim to *the procompetitive benefits* that the acquisition produced, as it assumed that the Supply Agreement required JELD-WEN to price its doorskins based on the *lower costs it achieved by integrating the Towanda plant*. JA2489-90.

Even assuming that is a valid measure of contractual damages, it is not a measure of antitrust injury. Indeed, it is very nearly the opposite. At bottom, it is a theory that the acquisition facilitated (arguably procompetitive) savings that the contract required JELD-WEN to pass on to Steves. The loss of those contractual benefits may be a *contractual* injury, but it is manifestly not an injury that "flows from that which makes [the] defendants' acts unlawful.'" *Novell*, 505 F.3d at 311. To the contrary, allowing Steves to use the antitrust laws to recover as treble damages the benefits of a contract that both *protects* it against any potentially anticompetitive effects and *secures* it the procompetitive effects of an acquisition would be "inimical to the purposes of" the antitrust laws. *Brunswick*, 429 U.S. at 488.

C. The District Court's Reasons for Finding Antitrust Impact and Injury Are Fatally Flawed.

Rather than focus on whether *Steves* suffered harm relative to but-for world and "coincid[ing] with the public detriment tending to result from the alleged violation," *Austin*, 903 F.2d at 1389-90, the district court focused on whether Steves proved any injury to competition at all. For instance, the court emphasized Steves' evidence that JELD-WEN had raised prices to *other* door manufacturers after the acquisition. JA1378-79. But that does not demonstrate impact or antitrust injury *to Steves*; to the contrary, it only serves to highlight that by locking in prices and entitling Steves to benefit from JELD-WEN's reduced costs, the Supply Agreement protected Steves from such harm.

The court claimed that "JELD-WEN, Masonite, and CMI competed aggressively for Steves' business before the merger and … the pre-merger competition ended after the merger." JA1367. But that theory—that there was greater competition and lower prices in the pre-acquisition world—only highlights the need for proof of injury vis-à-vis a but-for world where the acquisition never occurred.[4] Injuries based on the prices Steves thought it should have paid JELD-WEN under the Supply Agreement in a world where the acquisition in fact occurred demonstrate neither impact nor antitrust injury.[5]

The court made the same mistake in suggesting that Steves *could* have felt the effects of decreased competition because the Supply Agreement left it free to buy some doorskins from other suppliers. JA568; JA1378; JA1583-84. Again, Steves never tried to prove that the acquisition prevented it from buying from other manufacturers at lower prices. Instead, Steves based its injury on the doorskins it bought *from JELD-WEN*, claiming that *JELD-WEN* charged more and delivered less than the Supply Agreement required. JA568. Indeed, the court itself concluded that if JELD-WEN had complied with the Supply Agreement, Steves would have suffered no injury. JA3472-73.

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[4] The district court's mistaken decision to allow a but-for-the-breach showing to substitute for a but-for-the-acquisition showing of antitrust impact and injury contributed to other errors. If Steves had been required to show that it paid more than it would have absent an acquisition, the relevance of evidence that CMI was not sustainable as a stand-alone entity would have been undeniable. *See infra* pp.67-70.

[5] At any rate, the court's claim is belied by the undisputed facts. Masonite decided to stop selling to Steves months *before* the acquisition, largely because Steves signed the Supply Agreement with JELD-WEN. JA2174-75. And Masonite did not purportedly decide to stop selling to other independent manufacturers until *18 months* after the acquisition, and remained willing to sell to Steves on the spot market. JA1672; JA2132-35, 2175-77.

D. Steves Failed To Prove Even Its Fatally Flawed Theory of Antitrust Impact and Injury.

Making matters worse, Steves failed to prove even its own fatally flawed antitrust impact or injury theories. Steves' entire theory (and the district court's decision embracing it) rests on the proposition that the acquisition caused JELD-WEN to breach and terminate the Supply Agreement. JA1369-70, JA2243-44, 2251-54. But the record confirms that the acquisition did *not* cause JELD-WEN to do either. The perceived decrease in doorskin quality, for instance, began *before* the acquisition. JA1997-2001, 2150. Moreover, the district court held that Steves failed to present sufficient evidence that it actually received defective doorskins for purposes of its breach-of-contract claims, JA1098-1102, 1116-17, making it impossible to understand how the court could find that same evidence sufficient to show injury for purposes of Steves' antitrust claims, JA1370-72.

As for the increased prices under the Supply Agreement, revised reimbursement policy, and eventual termination of the agreement, that conduct did not occur until *years after* the acquisition; in fact, JELD-WEN *decreased* its prices under the Supply Agreement shortly after the acquisition. JA1987-88. The price increases and other conduct occurred only (and almost immediately) after Hachigian became JELD-WEN's CEO and began implementing a more aggressive business strategy. *See, e.g.*, JA2020-23, 2118-21. The district court itself acknowledged that JELD-WEN "did not use" any market power until Hachigian became CEO. JA3564.

The record thus plainly demonstrates that the dramatic escalation of the parties' contractual disputes, and the eventual termination of the Supply Agreement, was caused by Hachigian's more aggressive approach, not by any lingering effects of the years-old acquisition. Indeed, Steves conceded at trial that JELD-WEN could have breached the Supply Agreement with or without the acquisition. JA2181-82. And Hachigian's decision to terminate an agreement that he believed was "mispriced and unfair to JELD-WEN," JA2020-22, 2117-18, 2560-61, 3564, was no different from the decision JELD-WEN made in 2010 (well before the acquisition) to terminate its previous agreement with Steves. JA1977-78, 2109-10. Steves presented no evidence to support its witnesses' conclusory assertion that Hachigian would have behaved differently absent the acquisition.

In short, Steves has not shown (and cannot show) a "reasonably probable causal link" between the acquisition and its alleged injuries. *Advanced Health-Care Servs., Inc. v. Radford Comm. Hosp.*, 910 F.2d 139, 149 (1990). Accordingly, even if Steves had *asserted* legally viable theories of antitrust impact and injury, it still failed to *prove* them.

* * *

This case vividly illustrates why antitrust plaintiffs must show that they suffered harm relative to a but-for world, and an injury that "flows from that which makes [the] defendants' acts unlawful.'" *Novell*, 505 F.3d at 311. Without those requirements, every plaintiff asserting a breach of contract by a company with market power—especially one that acquired that power through a merger—could add an antitrust claim seeking treble damages and divestiture on top of its underlying contract claim, just by alleging that the defendant's market power enabled or encouraged its contractual breach. Worse still, plaintiffs could use the antitrust laws to recover treble damages based on contracts that *protect* them against the effects of allegedly anticompetitive conduct, thereby enriching themselves at the expense of competitors who lack comparable protections. Those results simply cannot be reconciled with the Supreme Court's repeated admonishments that the antitrust laws exist for "the protection of *competition*, not *competitors*." *Brunswick*, 429 U.S. at 489.

II. The District Court's Extraordinary And Unprecedented Divestiture Order Cannot Stand.

Even if Steves had some viable antitrust claim, the district court's extraordinary and unprecedented decision to order JELD-WEN to divest the Towanda plant years after it was acquired and integrated could not stand. While the Supreme Court has found the Clayton Act's remedial provision broad enough to allow for the possibility of divestiture in private party suits, it was quick to caution that this "does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief." *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990). For one thing, "equitable defenses such as laches, or perhaps 'unclean hands,' may protect consummated transactions from belated attacks by private parties." *Id.* at 296. Moreover, while "[i]n a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief," the same will not necessarily be true in a case brought by a private litigant. *Id.*

Applying those principles, this should have been a remarkably easy case. Courts routinely refuse to order the "extreme remedy" of divesture, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 322 (3d Cir. 2007), even when private parties wait only until the day of consummation to challenge a merger. Not bringing suit until four years later—after the costs of integration and subsequent capital investments have been incurred—should make divestiture a complete non-starter. Not only is laches an insurmountable obstacle, but the familiar four-factor test for injunctive relief shifts strongly against a divestiture remedy with the passage of time. The district court's divestiture order, which ignored those principles, the admonitions of the Supreme Court, and the advice of the United States, cannot stand.

A. Laches Bars Steves From Seeking Divestiture at this Late Date.

1. "Estoppel by laches generally applies to preclude relief for a plaintiff who has unreasonably 'slept' on his rights." *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 121 (4th Cir. 2011). In the context of mergers or acquisitions challenged under §7, courts have not hesitated to apply laches to "protect

consummated transactions from belated attacks by private parties." *Am. Stores*, 495 U.S. at 296. Indeed, numerous courts have found—on facts much less egregious than these—that "lack of diligence … completely barred the equitable remedy of divestiture." *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010).

For example, courts have found that laches barred private-party divestiture claims brought *at any time* after a merger was consummated—even if suit was brought within 24 hours. *See Taleff v. Sw. Airlines Co.*, 828 F. Supp.2d 1118, 1125 (N.D. Cal. 2011) (same day); *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp.2d 1159, 1172-73 (C.D. Cal. 2000) (one day later). And the Eighth Circuit found that private plaintiffs who sued for divestiture "nearly two months" after a merger was announced—and a month *before* the transaction closed—had engaged in "inexcusable delay[]." *Ginsburg*, 623 F.3d at 1235; *cf. Midwestern Mach. Co., Inc. v. Nw. Airlines, Inc.*, 392 F.3d 265, 277 (8th Cir. 2004) (finding that laches barred conduct remedies sought 11 years after merger).

As these courts have explained, while divesture may sometimes be "'simple, relatively easy to administer, and sure,' … this is only true *before* the transaction is consummated, or if stock or discrete tangible assets are all that later need be divested." *Ginsburg*, 623 F.3d at 1234 (emphasis added) (quoting *Am. Stores,* 495 U.S. at 281). Once a merger is consummated, and the newly acquired asset is fully integrated, "the remedial equities balance overwhelmingly in favor of denying this remedy," for "the hardship and competitive disadvantage resulting from forced divestiture" of a fully integrated asset "would be both dramatic and certain." *Id.* at 1235-36. Even setting aside the "costs and complexities of unwinding a merger," *Garabet*, 116 F. Supp. 2d at 1173, such a divestiture would "impose obvious hardship on the employees" of the integrated asset, and "might well damage competition and consumers by crippling the operations" of acquirer and acquired alike, *Ginsburg*, 623 F.3d at 1235-36.

2. Laches plainly bars a divestiture remedy here. Steves' delay in seeking divestiture was both extreme and extremely prejudicial. Steves concededly knew that JELD-WEN was planning to acquire CMI months before the acquisition was publicly announced in June 2012, and the announcement came four months before the acquisition was consummated. JA552-53, 1986, 2174-75. Yet Steves not only did not seek divestiture at any point during the six months before the closing, but told DOJ that it did not object to the acquisition. JA2721-22. And Steves did not file suit until *four years* after the acquisition was consummated.

That delay was "unreasonable and inexcusable" and unquestionably "resulted in prejudice" to JELD-WEN. *Midwestern Machinery*, 392 F.3d at 277. While Steves was sleeping on its rights, JELD-WEN was busy expending considerable capital, time, and effort integrating CMI's assets and operations into JELD-WEN. JELD-WEN closed CMI's headquarters and consolidated its functions into JELD-WEN's organization. JA1556, 2811-12. JELD-WEN moved doorskin production from other plants to Towanda, enabling it to mothball Marion and sell Dubuque without losing doorskin-production capacity. JA2514, 2809-10, 2837-38, 2842.

JELD-WEN made considerable capital investments in Towanda, which was in a state of disrepair. JA3455. JELD-WEN spent more than [redacted] to improve and upgrade the plant, and spent [redacted] installing its own manufacturing processes to ensure product consistency across JELD-WEN's operations. *See supra* pp.7-8. JELD-WEN spent 12 months and [redacted] modifying and adjusting the rest of its doorskin-manufacturing business to fully incorporate Towanda. JA3455. JELD-WEN also has made supply commitments to its other doorskin customers based on the manufacturing distribution and efficiencies enabled by the integration of Towanda. JA2776-79, 2798-99, 2840-41.

JELD-WEN also made considerable investments in the MiraTEC and Extira trim and panel business, which are separate product lines manufactured in Towanda. Those products provide key anchor products for JELD-WEN's expansion into the general building-products industry. That industry has no relation to JELD-WEN's doorskin business; indeed, there is no overlap between JELD-WEN's competitors in the doorskin market and its competitors in the trim and panel markets. JA2781-82, 2807-08. It is a particularly lucrative business, constituting [redacted]. JA2780, 2862.

To state the obvious, JELD-WEN would not have expended the time and resources to fully integrate and improve Towanda while shuttering other facilities had Steves sued JELD-WEN before (or even marginally contemporaneously with) the acquisition. JA2813, 2815. And if DOJ had objected to the acquisition due to opposition from Steves, JELD-WEN would have abandoned it entirely at relatively modest cost. JA2814-15. In short, Steves' four-year delay was unreasonable, inexcusable, and prejudicial in the extreme.

3. The district court excused Steves' egregious delay on the theory that Steves itself was not injured until JELD-WEN purportedly breached the Supply Agreement. This theory only underscores that Steves never suffered *antitrust* injury from the acquisition, as opposed to injuries from a later breach of contract *see supra* Part I, and in all events does not excuse Steves' mammoth delay.

If Steves were truly correct that reducing the number of doorskin suppliers in the United States from three back to two was anticompetitive, then it could have demonstrated that even before the acquisition was consummated and spared JELD-WEN, other market participants, and the courts the enormous costs and disruption imposed by these belated proceedings. To be sure, suing promptly would not have allowed Steves to recover tens of millions of dollars in treble antitrust damages. But that is a basic tradeoff built into private antitrust remedies. A party that sues promptly may obtain equitable remedies before an acquisition is consummated, while a party that waits may collect treble damages (assuming it demonstrates antitrust injury vis-à-vis the but-for world). But laches generally prevents a party from having its cake and eating it too, especially when it comes to the strong medicine of a divestiture order.

At any rate, that still leaves years of inaction unexplained. According to Steves, JELD-WEN began breaching the Supply Agreement nearly as soon as the acquisition closed, and Steves discussed an antitrust suit as early as August 2014—yet Steves did not file suit for *two more years*. JA1452-53, JA2753-54. Instead, Steves spent the next year stealing JELD-WEN's trade secrets to explore building a plant of its own (itself a reason to conclude that Steves has unclean hands), and pursuing contractual dispute-resolution procedures rather than divestiture. JA3568-70; *see Kloth v. Microsoft Corp.*, 444 F.3d 312, 325-26 (4th Cir. 2006) (applying laches to uphold dismissal of antitrust claim after finding plaintiffs' delay to settle separate claim inexcusable). Meanwhile, JELD-WEN was expending extensive time and resources integrating and improving Towanda—to achieve the very efficiencies and cost savings that Steves demands be passed on through contract pricing.

The district court reached the remarkable conclusion that Steves' four-year delay did not prejudice JELD-WEN *at all* because Steves waited so long to sue that JELD-WEN has now recovered much of its capital investments and is operating

Towanda profitably. JA3578. But courts have long rejected such through-the-looking-glass arguments that a long delay is more excusable than a short one because it gives the defendant a decent interval to enjoy the benefits of full integration. *See, e.g.*, *Gillons v. Shell Co. of Cal.*, 86 F.2d 600, 606-07 (9th Cir. 1936); *Coleman v. Corning Glass Works*, 619 F. Supp. 950, 954-55 (W.D.N.Y. 1985), *aff'd*, 818 F.2d 874 (Fed. Cir. 1987). Steves' massive delay in bringing suit converts divestiture from an equitable remedy to a punitive one, literally punishing JELD-WEN for making the costly investments in integration that are the entirely predictable and necessary result when a proposed acquisition goes unchallenged. To allow Steves to sit on the sidelines for years, content to enjoy anticipated cost savings from the acquisition and rest secure in its contractual rights, while JELD-WEN completed the integration process, shuttered other facilities, made unrelated capital improvements, and made contractual commitments to other market participants, is completely inequitable. Laches exists for cases like this.

B. The Traditional Test for Equitable Relief Precludes Divestiture.

For many of the same basic reasons, the familiar four-factor test for equitable relief forecloses a divestiture remedy here. Because divestiture is available only "when appropriate in light of equitable principles," *Am. Stores*, 495 U.S. at 285, a private plaintiff seeking that remedy must meet the traditional four-factor test for equitable relief, *i.e.*, must show (1) that it has suffered irreparable injury; (2) that monetary damages are inadequate to compensate for that injury; (3) that the balance of hardships favors equitable relief; and (4) that the public interest favors equitable relief. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Even when timely sought, injunctive relief is "a drastic and extraordinary remedy" that "is not casually granted" and "does not follow from success on the merits as a matter of course." *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 385 (4th Cir. 2017). And over time, the equitable factors shift strongly against granting the most extraordinary remedy of divestiture. None of those factors supports that extreme remedy here.

1. The harms Steves asserts could easily be remedied by damages or more narrowly tailored equitable relief.

Steves has not shown any irreparable injury that would justify resort to an equitable remedy because Steves sought and obtained the most obvious legal remedy, monetary damages. *See Buzard v. Houston*, 119 U.S. 347, 353 (1886) (availability of "full damages for the non-performance of the original agreement" forecloses equitable relief). Not only did Steves recover substantial past damages, but it sought and was awarded nearly $140 million in future damages after trebling. That the district court could award a divestiture remedy at the behest of "the possessor of a [$175] million judgment" is nothing short of "astonishing." *SAS*, 874 F.3d at 387.

Indeed, the adequacy of Steves' remedies at law was evident to the court and manifest in its extraordinary order simultaneously granting a future damages award and a divestiture in the alternative. Even the district court recognized that the future damages award and the divestiture order were duplicative, such that it could not simply order both. It thus seized upon the unprecedented solution of a springing order that granted Steves its favored remedy of divestiture but also awarded future damages if the divestiture order does not survive appeal. That order was unprecedented for good reason. When a court believes that a future damages award is viable, then there is no basis for awarding the equitable remedy of divestiture at all.

At a bare minimum, any possible future injury to Steves could easily be prevented by less drastic injunctive remedies. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (equitable relief "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs"). Indeed, the court itself recognized that narrower relief—such as "ordering JELD-WEN to supply Steves' requirements for a long term"—would suffice to remedy Steves' purported injuries. JA3543-44. It rejected that narrower relief solely on the ground that such an injunction "would not restore competition in the industry as a whole" or "aid [other] manufacturers." JA3544.

Those considerations were outside of the court's purview. A court hearing an antitrust suit does not have a roving license to investigate and remedy competitive harms however it sees fit; it has only the power to adjudicate the rights and remedy the injuries of the parties before it. That may authorize a court to order divestiture in antitrust cases brought by the government, because the harm to the government *is* the harm to competition as a whole. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961); *Am. Stores*, 495 U.S. at 295-96. But in a case like this, where a private plaintiff is asserting an injury grounded in its unique contractual relations with the defendant, the existence of a less drastic injunctive relief that fully redresses the plaintiff's injury forecloses more sweeping relief.

2. The balance of hardships and public interest tip sharply against divestiture.

The balance of hardships and the public interest tip even more sharply against the court's unprecedented divestiture order. Given Steves' delay, the harm to JELD-WEN from tearing apart a fully integrated company is massive. And the harm is not limited to JELD-WEN, but extends to third parties who rely on JELD-WEN and have never objected to the acquisition. Moreover, given the court's failure to heed the United States' advice and analyze the competitive effects of the divestiture in light of an identified buyer, it is speculative that there will be any procompetitive benefits to weigh against the massive dislocation produced by its unprecedented order.

1. The divestiture order inflicts massive harm on JELD-WEN and its customers. JELD-WEN has devoted years of effort and millions of dollars to improving and integrating Towanda. *See supra* pp.7-8, 43-45. That includes not only Towanda's doorskin manufacturing facilities, but also its non-doorskin MiraTEC and Extira facilities, which "ha[ve] never posed any antitrust concerns" and are intertwined with the rest of Towanda. JA3459-60, 3479 n.11, 3527. Forcing JELD-WEN to reverse that integration would not only deprive JELD-WEN and its customers of the benefit of those investments, but also impose the substantial "costs and complexities of unwinding a merger." *Garabet*, 116 F. Supp. 2d at 1173.

For instance, divestiture would destroy the significant efficiencies that the acquisition created, such as the mix model between JELD-WEN's four plants, *see supra* pp.7-8, forcing JELD-WEN and the divested entity to devote significant time and effort to unnecessarily duplicating each other's services and equipment so that each could again offer customers the same variety of doorskins that the combined entity offers today. JA3480-83, 3486-87. The ultimate losers would be doorskin purchasers, who would bear the burden of these forced inefficiencies (and the costs of the divestiture process itself) in the form of manufacturing and delivery delays and higher prices. *Cf. Ginsburg*, 623 F.3d at 1235-36 (rejecting divestiture that "might well damage competition and consumers by crippling the operations" of the manufacturer).

Moreover, "divestiture would make it necessary for JELD-WEN to redistribute to its legacy plants the [doorskin designs] that are currently manufactured at Towanda." JA3485-87, 3491. The substantial additional downtime necessitated by more frequent die changes would significantly reduce the capacity of those facilities, costing JELD-WEN tens of millions of dollars in revenues and leading to increased prices for its customers. *Id.* Indeed, at least in the short term, divestiture very likely would prevent JELD-WEN from fulfilling all of its supply contracts, causing logistical challenges and disrupting customers' production chains and purchasing processes. JA3490-91, 3521-22. Those "[d]irect effects on innocent third parties" weigh strongly against divestiture. *SAS*, 874 F.3d at 388.

2. In contrast to this certainty of harm to JELD-WEN and its customers, there is no guarantee that divestiture would increase competition in the doorskin market. As the United States explained in its statement of interest, "[r]estoring competition is the 'key to the whole question of an antitrust remedy.'" JA967 (quoting *E.I. Du Pont*, 366 U.S. at 326). And the effect on competition cannot be analyzed in the abstract, but depends on the identity of the proposed buyer and the terms under which it would operate. JA967-69. Accordingly, divestiture could be appropriate (if at all) only if there is actually "an independent buyer with the ability and incentive to operate as a vigorous competitor in the doorskin market." JA975.

The district court did not heed that warning or identify such a buyer before taking the great leap of awarding divestiture. Instead, it acknowledged that "the record does not identify entities, other than Steves, that are currently interested in buying Towanda and are capable of operating the plant." JA3483. As the United States specifically admonished, allowing Steves to acquire Towanda would do little to nothing to improve competition, for that would just create a third vertically integrated doorskin/door manufacturer with no additional incentive to compete in the doorskin market. JA974. The remaining door manufacturers thus would be "competitively *disadvantaged* by the divestiture," as it would strengthen one of their competitors while leaving them with "no independent suppliers from which to purchase doorskins." *Id.* (emphasis added).

The court did not rule out the possibility of allowing Steves to acquire Towanda, but insisted that it could determine the propriety of divestiture "without knowing the identity of the buyer." JA3536. Indeed, the court casually dismissed *all* of the factors the United States urged it to consider before granting divestiture as "premature," JA3537-38—presumably because, as the court acknowledged, Steves "provided practically no information" addressing any of them. JA3531-32. But the only thing that is premature is the divestiture order itself, because a court cannot conclude that benefits to competition outweigh certain harms to JELD-WEN and its customers without knowing the identity of the buyer and other details of the transaction. JA964-65.

The court's failure to identify any appropriate buyer is especially problematic in the unusual context of this case. Steves has no incentive to recruit a more appropriate buyer for Towanda, given its admitted interest in buying Towanda itself. JA3483. If anything, Steves has frustrated that effort by persuading the court to order onerous conditions that favor *Steves*, including, *inter alia*, a requirement to continue supplying Steves through 2024, and a restriction on the divested entity's ability to sell to JELD-WEN. JA1415. As the United States explained (and the court ignored), such conditions could not only deter willing buyers, but "threaten the viability of the divestiture buyer and distort competition on price and quality." JA974.

Moreover, the record does not even support a finding that Towanda could be a viable stand-alone business. Steves bore the burden of proof on that issue, and it utterly defaulted. Other than Towanda's brief window of success during the housing bubble, the only pertinent evidence was introduced by JELD-WEN, and that evidence conclusively demonstrated that Towanda cannot sell the volume of doorskins necessary to remain profitable. JA3478, Dkt.1652 at 6-11. Moreover, as a stand-alone entity, Towanda's costs would increase because it could no longer rely on JELD-WEN's structure of sales, administration, and technology services.

JA3480. The court's finding that this plant could survive as an independent business—even though it clearly was not viable the last time it was independent—rests on little more than hope and *ipse dixit*.

All of this leads to the unmistakable sense that the order here will not further competition for the market as a whole, but will allow Steves to purchase Towanda on the cheap. Steves' willingness to forgo nearly $140 million in damages to obtain a divestiture order ostensibly designed to benefit the market only underscores the speculativeness of any true benefit to competition on this record.

3. The court recognized that divestiture would cause "significant" harm to JELD-WEN, Towanda, and the public. JA3490. Indeed, the court even acknowledged that it could not determine on the record before it whether those harms would outweigh any potential benefits to the public. *See, e.g.*, JA3521 ("[t]he record does not permit quantification of those [divestiture] costs"); JA3527-28 ("the consequences of divestiture on JELD-WEN cannot be discerned with certainty"). But instead of concluding that Steves therefore failed to meet its burden of proving the extraordinary remedy of divestiture warranted, the court weighed that uncertainty in *favor* of divestiture, blaming *JELD-WEN* for failing to more precisely quantify the injuries that Steves' preferred remedy was likely to cause. *See, e.g.*, JA3482 (blaming "evidentiary void" on lack of "particularized evidence from JELD-WEN"), JA3487 ("The record does not show how much time or how much money

[making new equipment] would require because JELD-WEN has not put 'pen to paper' on that…."), JA3522, 3527-28.

That burden-shifting was wrong as a matter of law. To the extent Steves believed that the possible benefits of divestiture outweighed the obvious harms, it was *Steves*' burden to prove as much by quantifying both those benefits *and* those harms. *See SAS*, 874 F.3d at 385; *eBay*, 547 U.S. at 391 ("plaintiff … must satisfy [the] four-factor test"). Steves' failure to do so—and the court's acknowledgment that the record contained insufficient evidence to estimate those obvious harms—required the court to *deny* divestiture, not to grant it.

In the end, the district court could order the most extraordinary of antitrust remedies in these circumstances only by piling error upon error. Laches alone should have been an insuperable barrier to ordering divestiture after four years of integration, shuttered plants, and additional investments. The court was not even in a position to assess the balance of equities without identifying a buyer, and it could have ordered divestiture on this record only by shifting the burden of proof. There is a reason divestiture orders in private antitrust cases are exceedingly rare. A case brought four years after the fact, seeking a divestiture that could actually harm competition and allow Steves to purchase Towanda on the cheap, is not the place for an exception to the rule.

III. The District Court's Alternative Award Of Lost Profits Is Wholly Speculative And Unsupported.

Recognizing the substantial possibility that its novel divestiture order would not survive appeal, the district court held in the alternative that JELD-WEN must pay Steves *$139.4 million* in treble antitrust damages for its purported future lost profits. JA1418. While some alternative theory of more modest future damages might be viable, the staggering alternative award here is based on the purest conjecture. It relies entirely on the speculative assumption that when the Supply Agreement expires in 2021, Steves will be unable to obtain *any* ongoing supply of doorskins from any manufacturer at *any* tolerable price, and will therefore *immediately* go out of business—an assumption that contradicts both history and common sense.

A. Steves Cannot Claim Tens of Millions of Dollars in Damages Today on the Speculative Theory That It May Go Out of Business Years in the Future.

Steves' theory that it is entitled to tens of millions dollars today, because it will cease to exist as a viable entity as soon as the Supply Agreement expires, is speculative in the extreme. According to Steves, as soon as the Supply Agreement expires, JELD-WEN *may* refuse to continue supplying Steves with doorskins; and Steves *may* then be unable to obtain sufficient doorskins from another manufacturer at acceptable prices, and *may also* be unable to develop its own doorskin plant; and if so, Steves *may* then go out of business entirely, thereby losing *all* of its future profits—including profits on products that do not even require interior molded doorskins. JA2468-76.

That wildly speculative chain of events is more reminiscent of if-you-give-a-mouse-a-cookie than anything known to the rule of law. In fact, this appears to be the first case in the history of the common law in which a court has awarded damages for future lost profits on the theory that a viable company with ongoing operations will go out of business on some future date. That is unsurprising, as it is "hornbook law" that "future damages … are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971); *see LaVay Corp. v. Dominion Fed. Sav & Loan Ass'n*, 830 F.2d 522, 529 (4th Cir. 1987) ("Damages may not be awarded … based on an estimate of lost profits which is speculative."). Applying that rule, courts have routinely rejected future damages claims based the theory that a plaintiff may suffer some competitive injury on some distant future date. *See, e.g.*, *SureShot Golf Ventures, Inc. v. Topgolf Int'l, Inc.*, 754 F. App'x 235, 240-41 (5th Cir. 2018); *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 64-65 (2d Cir. 1988); *Plant Oil Powered Diesel Fuel Sys., Inc. v. Exxon-Mobil Corp.*, 801 F. Supp. 2d 1163, 1184-85 (D.N.M. 2011).

The Fifth Circuit's recent *Sureshot* decision is instructive. There, the plaintiff (Sureshot) brought Sherman and Clayton Act claims against a competitor (Topgolf) who had acquired a third party (Protracer) whose golf ball-tracking technology was key to SureShot's golf-entertainment business, and who refused to assure SureShot that it would continue to provide access to that technology in two years when Sureshot's contract with Protracer expired. 754 F. App'x at 237-38. According to Sureshot, the loss of that technology would make it impossible for Sureshot to compete against Topgolf. *Id.* at 238, 240. The district court dismissed the claims, and the Fifth Circuit affirmed. *Id.* at 236. Because Sureshot alleged only that Topgolf "might, in the future, deny Sureshot a license to use the Protracer ball-tracking system," not that Sureshot had actually been denied access to that system, its complaint sounded only in "hypotheticals and future threatened injury" and was too speculative to proceed. *Id.* at 240.

So too here. Indeed, Steves' contention that it will immediately go out of business when the Supply Agreement expires is rank speculation at best. For one thing, nothing forecloses the possibility that Steves could continue buying doorskins from JELD-WEN, either on the spot market or by negotiating another long-term supply agreement (as Hachigian encouraged Steves to do). *See, e.g.*, JA1455 (JELD-WEN "remains interested in selling doorskins to Steves on terms that make good economic sense"), JA1456-57 (same), JA2169-73, 2577-78. In fact, Sam Steves admitted at trial that Steves would not turn down a new supply agreement with JELD-WEN if the parties could agree on reasonable terms. JA2056-57. Not only does this possibility render the future damages award unduly speculative, but it improperly denies JELD-WEN its legal right to mitigate damages by supplying Steves on reasonable terms instead of paying trebled damages for future harms.

Even leaving JELD-WEN aside, Steves could find another supplier. Masonite has already offered to sell doorskins to Steves on the spot market. JA2133-35, 2176-80. Although Steves may prefer a long-term supply agreement, it has purchased millions of doorskins from Masonite and others on the spot market in the past. JA1978-79, 2111-13. Indeed, when the previous long-term supply agreement between Steves and JELD-WEN was terminated in 2010, Steves chose to buy doorskins on the spot market for *two years* before eventually signing a new long-term supply agreement with JELD-WEN. JA1978-79, 2111-13.

While Steves speculates that the prices Masonite would charge it on the spot market will be too high, Steves cannot plausibly claim that those prices would drive it out of business when Sam Steves admitted at trial that he did not even know what price Steves would need to remain profitable in 2021 and beyond. JA2057. In fact, Sam Steves conceded in the trade secrets trial that Steves would *not* go out of business if it purchased doorskins from Masonite on the spot market. JA2978. Moreover, there are several foreign doorskin manufacturers that could potentially supply Steves with doorskins, an option that Steves has used in the past and admitted that it is exploring for the future. JA2058-61, 2064-70.

Finally, there is always the possibility Steves will develop the capacity to supply its own doorskins—an option it has explored in the past, and stole JELD-WEN's trade secrets to evaluate. *See supra* pp.12-14. Indeed, Steves has already negotiated with at least one company about potentially partnering to build a doorskin plant, and has explored the capabilities of another possible partner as well. JA2075-76. While building a plant would be a substantial investment, it is hard to imagine that Steves would prefer to go out of business (and lose *all* of its future profits) rather than make that effort.[6]

B. Steves Improperly Sought Damages for Profits It Would Have Earned *Because of* the Acquisition.

Adding insult to injury, Steves sought future lost profits that Steves claims it should have earned *because of* the allegedly anticompetitive acquisition. Because a plaintiff may recover only "damages resulting from the particular antitrust injury on which [the defendant's] liability … is premised," *Comcast Corp. v. Behrend*, 569 U.S. 27, 36 (2013), "the ultimate relief awarded must take into account any benefits which would not have been received by [the] plaintiff 'but for' the defendant's anticompetitive conduct," *L.A. Mem'l. Coliseum Comm'n v. Nat'l Football League*,

[6] Of course, if Steves *does* eventually go out of business after the Supply Agreement expires—and it can prove that hypothetical future injury was caused by some anticompetitive conduct by JELD-WEN—it can sue for that injury then, as JELD-WEN has conceded. *See Zenith*, 401 U.S. at 339; JA577 n.9. It is therefore irrelevant that Steves' speculative claim stems from the "single act" of the CMI acquisition. JA578-79.

791 F.2d 1356, 1367 (9th Cir. 1986). After all, it would hardly further the goals of the antitrust laws to allow plaintiffs to profit from the very conduct that they challenge as anticompetitive.

Yet both Steves' past damages model and its *future* damages model fail to account for "benefits [Steves] derived from the anticompetitive conduct." 1-9 ABA Antitrust Law Developments 9C (8th ed. 2016). As explained, *see supra* pp.32-36, by comparing the prices Steves actually paid to the prices it should have paid under the Supply Agreement, Steves' past damages model baked in the benefits of the cost reductions that the acquisition, improvement, and integration of the Towanda plant enabled JELD-WEN to achieve. Steves' *future* damages model did much the same, for Steves based its lost "future" profits on its *actual profits* from 2015 through early 2017—which reflected the real world in which acquisition actually occurred, without any attempt to exclude profits Steves made on account of the acquisition. JA2471-73, 2492-95.

That dramatically skewed its damages model (and the jury's verdict). Like JELD-WEN and Masonite, CMI was not just a doorskin manufacturer; it also competed with Steves in the market for finished doors. JA2505-06. After JELD-WEN bought CMI, Steves benefited from the gap in the door market, growing its share of that market from 7% in 2012 to 11% in 2016 and raising its prices by 26%. JA2552-53, 2621-22. Steves' damages model made no adjustments for those benefits and thus allowed it to recover—three times over—"benefits which would not have been received … but for the [allegedly] anticompetitive conduct." *L.A. Mem'l.*, 791 F.2d at 1367.

The district court's principal response to that problem was (as usual) to blame JELD-WEN, claiming that it failed to sufficiently explain the problem or present expert evidence quantifying it. JA1377. In fact, JELD-WEN explained the problems in crystal-clear terms, Dkt.969 at 7-8, Dkt.1822 at 6-7, Dkt.1838 at 9-10, and having pointed out the error, it was not JELD-WEN's burden to present its own expert to document the precise degree to which Steves' damages were erroneously inflated.

The court suggested in a footnote that *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), entitled Steves to seek damages that baked in the benefits of the acquisition. But *Hanover Shoe* rejected only the so-called "passing-on" defense, holding that a defendant cannot avoid antitrust liability on the ground that any harm caused by its anticompetitive conduct "was reflected in the price charged [by the plaintiff] to its customers." 392 U.S. at 487-89. It did not reject the fundamental principle that any *benefits* a plaintiff has received from the challenged conduct "must be deducted from" any measure of damages. *L.A. Mem. Coliseum*, 791 F.2d at 1367.

In short, Steves' repeated efforts to recover treble damages for its purported loss of the *benefits* of the acquisition not only underscores that it did not prove antitrust injury, *see supra* Part I.A, but also renders its damages claims invalid as a matter of law, *see Concord Boat*, 207 F.3d at 1057.

IV. The District Court Made Multiple Evidentiary Errors In The Antitrust/Breach-of-Contract Trial That Require A New Trial.

Even if Steves' antitrust claims were viable, the case must be remanded for a new trial given the district court's numerous evidentiary errors. The court repeatedly excluded evidence based on its own view of its *weight* rather than its relevance, and in so doing hamstrung JELD-WEN's ability to mount a meaningful defense.

A. The Exclusion of Evidence Related to DOJ's Prior Investigations of the Acquisition Requires a New Trial.

Twice—in 2012 before the acquisition closed, and again in 2016 at Steves' request—DOJ investigated whether JELD-WEN's acquisition of CMI posed any threat to competition. And twice, DOJ closed its investigation without taking further action. That critical evidence was plainly admissible.

The district court nonetheless excluded it wholesale, initially positing that it was "not relevant." JA399. That is clearly wrong. Under the "low barrier" set by the Federal Rules, *United States v. Leftenant*, 341 F.3d 338, 346 (4th Cir. 2003), that evidence is plainly relevant. Indeed, courts routinely afford weight to agency inaction in reviewing private antitrust suits. *See, e.g.*, *Ginsburg*, 623 F.3d at 1235;

Alberta Gas Chem. Ltd. v. E.I. Du Pont De nemours & Co., 826 F.2d 1235, 1239 & n.2 (3d Cir. 1987); *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, Local Lodge No. 1821 v. Verso Paper Corp.*, 80 F. Supp. 3d 247, 281 (D. Me. 2015); *Garabet*, 116 F. Supp. 2d at 1173 n.13.

The court later grudgingly admitted that DOJ's (in)actions had some "limited probative value," JA1393, but held that probative value outweighed by the risk that the jury might "substitute the Government's decision for [its own]." JA399-400, 1393-94. But exclusion of relevant evidence under Rule 403 is "only proper when the probative value of the evidence is *substantially outweighed* by the danger of confusion of the issues or misleading the jury." *E.I. DuPont De Nemours & Co. v. Kolon Indus. Inc.*, 564 F. App'x 710, 715 (4th Cir. 2014). That is plainly not the case here.

Indeed, not only was the risk of confusion minimal, but it could easily have been addressed several ways short of exclusion. For instance, the court could have addressed its stated concerns directly by instructing the jury that it must assess the evidence independently and not substitute its perception of the government's views for that independent assessment—an option that JELD-WEN presented, JA1346, 3123, but the court never discussed, JA399-400, 1393-94. The court could have let the parties present evidence explaining DOJ's process and emphasizing the many reasons why DOJ might not challenge an acquisition—another option that JELD-

WEN presented, JA1346, 3122-23, but the court rebuffed, JA1394. Given those straightforward options for minimizing any theoretical risk of prejudice to Steves, the court plainly erred by excluding all evidence that DOJ had twice investigated and declined to challenge the acquisition.

A fortiori, the court erred by excluding the even more significant evidence that Steves itself told DOJ in 2012 that it had no objection to the then-pending acquisition, and then told DOJ in 2015 (while encouraging DOJ to investigate the then-long-completed acquisition) that doorskin prices had not risen. JA202, 3129-66. That evidence critically undermined Steves' claims by demonstrating that Steves itself did not believe in 2012 that reducing the number of doorskin manufacturers from three to two would have an anticompetitive effect, and that Steves likewise did not believe in 2015 that the acquisition had increased prices. It likewise critically undermined Steves' credibility, and correspondingly supported JELD-WEN's theme that Steves had pressed its antitrust claims only to gain leverage against JELD-WEN in their contract dispute.

Instead of letting the jury hear that evidence, the court limited JELD-WEN to asking Steves generically whether it had made an "official statement" to "somebody"—and threatened JELD-WEN with a mistrial should it so much as mention DOJ. JA1881, 2167. And when JELD-WEN asked Steves about its 2015 statement, the court announced in open court, "we're not going to need to discuss that anymore" because "there isn't anything to that." JA2167-68. Those limitations (and the court's commentary) eviscerated the persuasive force of that evidence, excluding critical context and giving the jury the impression that Steves' prior inconsistent statements to *federal antitrust enforcement authorities* were inconsequential comments to "somebody." *Id.*

The court did not explain why it found that evidence more prejudicial than probative. JA399-400, 1393-94. Instead, it just referred back to its ruling excluding the fact that the DOJ had (twice) investigated and not challenged the acquisition. JA1875 ("If we open the door to the Department of Justice, then we're going to have to explain why it is, and we're going to get right into what I kept out."). But Steves' contemporaneous statements to DOJ are even more probative than DOJ's conclusion, and protecting an earlier (erroneous) evidentiary ruling is not a justification for excluding other even more probative and less potentially confusing evidence.

B. The Exclusion of Evidence That CMI Was in Severe Financial Distress Before the Acquisition Requires a New Trial.

The court also erred by ruling—mere hours before opening statements—that JELD-WEN could not introduce evidence that CMI was in severe financial distress at the time of the acquisition. JA1948-49. That evidence would have dramatically undermined Steves' case by showing that CMI would not have been an effective competitor (*e.g.*, would have been a financially weak price taker unable to cut prices, even if it did not fail entirely) even if the acquisition had never taken place—meaning that the acquisition did not "substantially … lessen competition." 15 U.S.C. §18. As the district court acknowledged, JA539, no other court has ever excluded such evidence under comparable circumstances. That unprecedented ruling was clearly wrong, was clearly prejudicial, and clearly warrants a new trial.

It is undisputed that CMI "was in difficult financial straits in 2011 and 2012 before the merger." JA3446. CMI "had lost money every year since 2008," and had only been kept afloat by "a $36 million loan from the two families who owned it." JA520. As of March 2012, CMI owed an additional $16.7 million under third-party loan agreements set to expire in seven months, with no commitments from its lenders to refinance. *Id.* On top of that, CMI lost two of its largest customers in 2010, and lost its largest remaining customer in Steves after unsuccessful negotiations for a long-term supply agreement. JA542. Given those precarious circumstances, CMI's own independent auditors reported "substantial doubt about [its] ability to continue as a going concern." JA520.

That evidence was unquestionably relevant. Courts have often recognized that an acquired firm's "weakened financial condition" is admissible to show that "no substantial lessening of competition occurred or was threatened" by the challenged acquisition. *United States v. Int'l Harvester Co.*, 564 F.2d 769, 774 (7th Cir. 1977); *see, e.g.*, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1220-21 (11th Cir.

1991); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 153 (D.D.C. 2004). Indeed, even the district court acknowledged that "an acquired company's financial weakness may be probative of the lack of anticompetitive effects from a merger," JA533—and with good reason, as an acquired firm's market share may not "give a proper picture of [its] future ability to compete." *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 501 (1974).

Nonetheless, the jury heard none of that evidence. The court's reasoning for excluding that critical information is deeply flawed. The court noted that JELD-WEN was not raising a "failing firm" defense, JA523-25, 527-28, which requires showing a "grave probability" that the acquired firm will dissolve and no other acquirer is available, *Gen. Dynamics*, 415 U.S. at 506-07. But settled Supreme Court precedent confirms that a defendant can introduce evidence that an acquired firm was feckless as a standalone competitor, including evidence of financial weakness, without presenting a "failing [firm]" defense. *Id.*; *Int'l Harvester*, 564 F.2d at 774 ("weakened financial condition" relevant "even though the defendants do not rely on the failing-company doctrine").

The court declared the evidence more prejudicial than probative—the first court ever to reach that conclusion as to evidence of an acquired firm's weakened financial condition. JA539. But the court's ruling had nothing to do with any identified prejudice; it was simply a product of its view that JELD-WEN's evidence was not *persuasive*. Of course, a judge "may not rule on the *admissibility* of evidence based upon his view of the *persuasiveness* of that evidence." *United States v. Evans*, 728 F.3d 953, 963 (9th Cir. 2013) (emphasis added) (brackets omitted)).

C. The Exclusion of Evidence on How Steves Obtained JELD-WEN's Trade Secrets Requires a New Trial.

The court committed another critical evidentiary error by preventing JELD-WEN from telling the jury in the breach-of-contract/antitrust trial that Steves had hired Pierce to obtain JELD-WEN's trade secrets to evaluate building its own doorskin plant. During the breach-of-contract/antitrust trial, Steves claimed that there were several barriers to Steves' entry into the doorskin market, including that it lacked the knowledge and experience to build a doorskin plant. *See, e.g.*, JA2037, 2292-93. In reality, Steves had already purchased that knowledge and experience by hiring Pierce to provide it with JELD-WEN's trade secrets. JA2922-26.

That evidence was obviously relevant. *See, e.g.*, *United States v. Waste Mgmt., Inc.*, 743 F.2d 976, 982 (2d Cir. 1984) (when reviewing mergers, factfinder "must take into account potential competition from firms not presently active in the relevant product and geographic markets"). The court's decision to exclude it—

which it delivered without meaningful explanation or analysis, JA401-03—was obviously wrong.[7]

The court compounded its error by preventing JELD-WEN from using this evidence for impeachment. JA402-03. Sam Steves testified that it is "highly unlikely" that Steves will build a doorskin plant because "we obviously don't know how to do it ourselves." JA2037; *see also, e.g.*, JA2038, 2040, 2043. Steves' hiring of Pierce to acquire the necessary knowledge directly contradicted Steves' testimony. The exclusion of that evidence even for purposes of impeachment was inexplicable and largely unexplained other than another misguided effort to protect an earlier erroneous evidentiary ruling.

* * *

The combined effect of these erroneous rulings cannot be gainsaid. At the point that JELD-WEN was unable to rely on: (1) DOJ's decision not to object to the acquisition; (2) Steves' decision not to object to the acquisition; (3) CMI's financial condition; and (4) the falsity of testimony that Steves lacked knowledge to build a

[7] Instead, the jury heard only that Steves had "hired a part-time consultant by the name of John Pierce" who had provided "helpful" information about "potentially building a door skin plant." JA2039-40, 2071. That sanitized version of the truth unsurprisingly left the jury with the false impression that Steves knew little about building a doorskin plant and was not particularly interested in learning more.

plant, JELD-WEN's ability to mount a meaningful defense was wholly eviscerated. The resulting verdict cannot stand.

V. The District Court's Instructional Errors Require A New Trial On JELD-WEN's Trade-Secrets Counterclaims.

The district court committed equally serious errors in its jury instructions at the trade-secrets trial, misstating the standards for both whether a trade secret is confidential and whether misappropriation is willful and malicious.

1. The court correctly instructed the jury that "[a] trade secret may be comprised of several elements," and "a trade secret may exist if some, or even all, of its individual elements are public, provided that the trade secret as a whole remains confidential." JA936. But the court then limited that instruction to only one of the trade secrets at issue, on the ground that it was the only "combination trade secret" in the case. *Id.*; JA2991.[8]

That limitation was both incorrect and prejudicial. Absolute secrecy is not required for a trade secret to be protected. *See, e.g.*, *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 418 (4th Cir. 1999). Instead, secrecy is a "relative" concept, *see id.*, which is why courts have regularly protected trade secrets that

[8] A "combination trade secret" is "a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret." *AirFacts, Inc. v. de Amezaga*, 909 F.3d 84, 96 (4th Cir. 2018).

contain both public and non-public information. *See, e.g.*, *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 975 (8th Cir. 2011); *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 411 (6th Cir. 2006); *Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 674-75 (Wash. 1987). By instructing the jury that JELD-WEN's trade secrets were wholly unprotectable if any part of them was public knowledge, the court set the bar far higher than the law requires—and the jury followed that flawed instruction, rejecting all but eight of the 67 asserted trade secrets.

2. The court also erred by defining willful and malicious trade-secret misappropriation under both federal and Texas law to require an "intent to cause injury or harm" to the plaintiff. JA946, 950. Thieves are rarely motivated by a specific intent to harm their victims, as opposed to enriching themselves. It is well understood, in the trade-secrets space as with other forms of intellectual property, that willful and malicious misappropriation requires only a "conscious disregard of the rights of another"—*i.e.*, knowledge of the rights being infringed, or recklessness as to their existence. *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 730 (7th Cir. 2003); *see Legacy Data Access, LLC v. MediQuant, Inc.*, No. 3:15-cv-00584-FDW-DSC, 2017 WL 6001637, at *19 (W.D.N.C. Dec. 4, 2017); *Silicon Knights, Inc. v. Epic Video Games, Inc.*, 917 F. Supp. 2d 503, 518-19 (E.D.N.C. 2012).

That error again caused JELD-WEN significant prejudice. The jury had no difficulty finding misappropriation, and the evidence was more than sufficient to show that Steves demonstrated "conscious disregard of [JELD-WEN's] rights." *Learning Curve*, 342 F.3d at 730. But the jury rejected JELD-WEN's claims of willful and malicious misappropriation because it did not find the additional "intent to cause injury or harm" that the instruction erroneously required. JA946, 950.

Because these instructional errors could easily have affected the verdict, a new trade-secrets trial is required.

VI. The District Court Erred By Entering Judgment For Intervenor-Defendants On Claims That JELD-WEN Never Asserted.

The district court erred by granting judgment for intervenor-defendants Sam Steves, Edward Steves, and John Pierce on trade-secrets claims that JELD-WEN never filed against them. JA1149-50, 1421. JELD-WEN brought its trade-secrets counterclaims only against Steves as a corporation—not against Sam Steves and Edward Steves as individuals, and not against John Pierce at all. Indeed, it could not have sued those individuals in this case because none was subject to personal jurisdiction in Virginia. JA420 n.1. And when the individuals intervened as defendants in Virginia, asserting a personal interest in assisting *the company's* defense, JELD-WEN was not required to abandon its earlier-filed claims in Texas and assert claims against them in Virginia. JA421-22; Fed. R. Civ. P. 13(a)(2)(A) ("The pleader need not state the claim if … the claim was the subject of another pending action."). JELD-WEN's choice to continue pursuing its case against them in Texas state court was fully within its rights as the master of its own complaint. *See United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 405-06 (4th Cir. 2013).

The district court nonetheless purported to enter judgment for intervenor-defendants on hypothetical claims that JELD-WEN never brought. But the Federal Rules allow a court to enter judgment only on an actual "claim or defense," and only when a party "has been fully heard on an issue," Fed. R. Civ. P. 50(a); they do not allow judgment on invented claims that a party never actually raised. *Cf. Shenandoah Valley Network v. Capka*, 669 F.3d 194, 201 (4th Cir. 2012) ("[F]ederal courts are prohibited from issuing advisory opinions."). Indeed, courts routinely refuse to grant judgment on claims that were not asserted. *See, e.g.*, *800 Adept, Inc. v. Murex Sec., Ltd.*, 539 F.3d 1354, 1367-68 (Fed. Cir. 2008); *Hudson v. Air Line Pilots Ass'n Int'l*, 415 B.R. 653, 660 (N.D. Ill. 2009); *Civix-DDI, LLC v. Cellco P'ship*, 387 F. Supp. 2d 869, 881 (N.D. Ill. 2005). The district court cannot preempt JELD-WEN's separate litigation in Texas, or prejudge the merits of any preclusion argument intervenor-defendants may try to raise in that litigation, by entering judgment on claims that JELD-WEN never asserted or pursued. *See Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011) ("a court does not usually 'get to dictate to other courts the preclusion consequences of its own judgment'" (quoting 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §4405 (2d ed. 2002)).

VII. This Case Should Be Reassigned On Any Remand.

As the decision to enter judgment against JELD-WEN on claims it never brought vividly illustrates, the district court long ago ceased adjudicating this case in a manner that comports with either the appearance or the reality of fairness. Accordingly, if this Court determines that remand is necessary, it should exercise its discretion to reassign this case.

So much about the proceedings below was unprecedented. The district court's willingness to let Steves "dress up in antitrust garb what is, at best, a business tort or contract violation," *Procaps*, 845 F.3d at 1087, without even showing injury vis-à-vis a but-for world, was unprecedented. The court's private-party divestiture order—issued six years after the acquisition, without identifying a buyer—was unprecedented. The court's award in the alternative of $139.4 million in "future damages" on the sheer possibility that Steves may someday go out of business was unprecedented. And the entry of judgment against JELD-WEN on claims it never asserted and had previously asserted in separate litigation is unprecedented. The explanation for all these firsts is not that this was an unprecedentedly anticompetitive acquisition, or that Steves is the first private party to make such bold requests. Instead, this series of unprecedented rulings is a sure sign that the proceedings below went irretrievably off the rails. Accordingly, should remand become necessary, reassignment is the best way to ensure both the appearance and reality of justice.

The propriety of reassignment depends on whether a judge would likely have "substantial difficulty in putting out of his … mind" any "previously expressed views or findings"; whether reassignment "is advisable to preserve the appearance of justice"; and whether it "would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *United States v. North Carolina*, 180 F.3d 574, 583 (4th Cir. 1999). Those showings are readily satisfied here.

Judge Payne has made repeated and critical errors that fundamentally skewed the proceedings against JELD-WEN. Those include not only the errors detailed above, but also (*inter alia*):

- Dismissing JELD-WEN's counterclaim for breach of the implied covenant of good faith and fair dealing, thereby preventing the jury tasked with deciding Steves' breach-of-contract and antitrust claims from hearing evidence of Steves' reciprocal contract breaches, JA304-315; Dkt.1824 at 4;
- Excluding testimony that would have rebutted Edward Steves' testimony that the acquisition had not improved Steves' profitability and market share in the doors market, JA601-02; Dkt.1824 at 13-16;
- Excluding highly relevant evidence regarding potential entry into the doorskin market, JA1883-99, 1902-04, 2072-74, 2550, 2587-90, 2593-94, 2599-2602, 2612-20; Dkt.1824 at 16-20;
- Preventing JELD-WEN from presenting a complete picture of the efficiencies the acquisition created, Dkt.1824 at 20-21; JA2518-19; *compare* JA1908-09, 1918-21, *and* JA2603-04, 2606-07, *with* JA2669-71, and

- Repeatedly threatening JELD-WEN with a mistrial if, among other things, it introduced evidence on an issue that it could not prove to Judge Payne's satisfaction, JA1881, 1906-07, 1909-15; *see* JA1863-64, while allowing Steves with impunity to pursue a legal theory that was dismissed under Rule 50, JA666, violate a court order during its opening statement, JA1951, and improperly argue for punitive damages during its closing statement, JA2676-77.

These serious and consistent errors, which individually and collectively hamstrung JELD-WEN in presenting its claims and defenses, confirm that it is highly unlikely that Judge Payne could set aside his "previously expressed views or findings." *North Carolina*, 180 F.3d at 583. Accordingly, if this Court remands, it should reassign this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment on Steves' antitrust claims and remand with instructions to enter judgment for JELD-WEN on those claims. In the alternative, this Court should vacate the judgment on Steves' claims and remand for further proceedings. In either event, this Court should vacate the judgment on JELD-WEN's trade-secrets counterclaims, including the purported counterclaims against the intervenor-defendants, and remand for a new trial on the counterclaims against Steves.

Respectfully submitted,

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September 9, 2019

STATEMENT REGARDING ORAL ARGUMENT

JELD-WEN respectfully requests oral argument. This appeal presents important issues of federal antitrust law, including serious questions regarding the validity of the first divestiture order ever entered in a private antitrust suit. It also raises complicated and record-intensive evidentiary issues, and difficult questions of federal trade-secret law. JELD-WEN respectfully submits that oral argument would assist the Court in reviewing the convoluted record in this case, which includes numerous opinions and orders and two full jury trials, and in deciding the various complex issues raised in this appeal.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation set forth in this Court's order dated June 4, 2019 because it contains 17,970 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

September 9, 2019

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
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